irrelevant to this discussion, "were made in phraseology." (See also H. Rep. 208, 80th Cong., on this point.)[2]

Professor Moore has noted that sections 1783 and 1784 "substantially carry out the provisions of the Act of July 3, 1926." (Moore's Commentary on the United States Judicial Code (1949), p. 364).

It would be a startling and unique reversal of settled rules of statutory interpretation to hold that in enacting the 1948 Codification, Congress intended to effect a substantial change in the scope and meaning of the Walsh Act, when such change is neither required by the language employed, nor identified or explained as such in the Reviser's Notes.

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[2] The same intention to improve style, not to make material changes in the law, appears in the statements made by the proponents of the legislation before the House Committee on the Judiciary in March of 1947 (Hearings before Subcom. No. 1, H. Rep. Com. on the Judiciary, 80th Cong., 1st Sess., on H. R. 1600 and H. R. 2055).

Charles J. Zinn, law revision counsel of the Committee on the Judiciary, said:

> "In the work of revision, principally codification, as we have done here, keeping revision to a minimum, *I believe the rule of statutory construction is that a mere change of wording will not effect a change in meaning unless* a clear intent to change the meaning is evidenced.
>
> To find out the intent, I think the courts would go the report of the committee on the bills and these reports are most comprehensive. We have incorporated in them Mr. Barron's notes to each section of the bills, both criminal code and the judicial code.
>
> It is clearly indicated in each of those reviser's notes whether any changes was intended so that merely because we have changed the language—we have changed the language to get a uniform style, to avoid awkward expression, to state a thing more concisely and succinctly—*but a mere change in language will not be interpreted as an intent to change the law unless there is some other clear evidence of an intent to change the law*" (p. 40) italics added. (See also, U. S. Code Cong. Sen. Pamph. pp. 1980-81.)

During the six years after the 1948 codification, there was no effort to apply Section 1783 to any situation or case beyond the terms of the original enactment. It was not until Judge Noonan of the District Court of the Southern District of New York wrote his opinion in the case of *United States* v. *Leff* (Crim. 143-309 Op. No. 21148), that any Attorney General claimed or any Judge held that Section 1783 authorized the issuance of a subpoena requiring a citizen abroad to return for a Grand Jury investigation.

Meanwhile, however, the State Department had declared, as late as August 1, 1952, that the Judicial Code merely "reenacted" the Act of July 3, 1926 (2 Foreign Service Manual, Sec. 874.3). Rule 17 of the Federal Criminal Rules continued for a year after enactment of the Code to make reference to the "Act of July 3, 1926". The words "Title 28 U. S. C. Sec. 1783" were inserted in a later amendment only for the purpose of making "proper reference to Title 28" as the Advisory Committee stated in "Explanatory Statement to Accompany amendments to the Federal Rules of Criminal Procedure" (H. Doc. 30, 81st Cong., 1st Sess., p. 5).

3.

The subpoenas in question did not constitute lawful mandates, which the Petitioners were required to obey.

The Walsh Act, as originally enacted, provided that the "judge of the court before which such action is pending" may order a subpoena to issue "commanding such witness to appear before the said court" (former 28 U. S. C. 712).

In the streamlining process of codification, Section 1783 modified this to provide that a "Court of the United States may subpoena for appearance before *it*, a citizen or resident of the United States who * * * (2) is beyond the juris-

diction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General.

To appear to give testimony in a criminal proceeding before *it*, is to appear before the Court in which such proceeding is actually pending.

However, Judge McGohey's order authorized the issuance of a subpoena commanding the appellants to appear before "the January Special Grand Jury for the Southern District of New York" (R. App. 4a).

The Grand Jury is not a Court, and is not a place for the exercise of judicial power.

A "court" is

> "a tribunal empowered to hear and determine issues between parties, on pleadings entered oral or written, and on evidence to be adduced under defined and established rules, according to the settled principles of law." *State* v. *Columbia*, 17 S. C. 80, 82.
>
> "A tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law" (*Von Schmidt* v. *Widber*, 99 Cal. 511, 512).
>
> "A court 'requires for its existence the presence of its judges, or a competent number of them, and a clerk, at or during which, and at a place where it is, by law, authorized to be held and the performance of some public act indicative of the design to perform the functions of a court." *In re Terrill*, 52 Kan. 29, 31.

The composition, attributes and tradition of a court are quite different from those of a Grand Jury, and the differences all go to emphasize that, related though a Grand Jury may be to the court, it is not *the* court, any more than its relationship to the prosecutor makes it *the* prosecutor.

As this Court said in *Re Oliver*, 333 U. S. 257, 264-5:

> "Grand Juries investigate and the usual end of their investigation is either a report, a 'no bill' or an indictment. They do not try and they do not convict. They render no judgment."

In *Spector* v. *Allen*, 281 N. Y. the appellant had "wilfully refused to produce before the Grand Jury a paper which the foreman of the Grand Jury directed him to produce. He deliberately removed that record from the jurisdiction of the Court". The question presented to the Court of Appeals was whether in so doing, appellant had disobeyed a mandate of the court to produce the paper. The Court held in the negative, saying:

> "The grand jury is an arm of the court, but it is not the court."

In *U. S.* v. *Thompson*, 251 U. S. 407 this Court adopted as its own the statement of the Solicitor General:

> "that the power and duty of the Grand Jury to investigate is original and complete * * * and is not, therefore dependent for its exercise upon the approval or disapproval of the court."

There is sound reason for applying Section 1783 to trials, actions or proceedings actually pending in Court only and not applying it to Grand Jury investigations.

The distinction between the investigative steps *i. e.*, Grand Jury proceedings—and the adjudicative steps—*i. e.*, "criminal proceeding"—had long been recognized and was firmly established by 1948.

A leading case on the point is *Post* v. *United States*, 161 U. S. 583, 567, where the Supreme Court said:

> "The submission of a bill of indictment by the attorney for the government to the Grand Jury, and the examination of witnesses before them, are both in

> secret, and are no part of the criminal proceedings against the accused, but are merely to assist the Grand Jury in determining whether such proceedings shall be commenced; and the Grand Jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open Court."

Historically, the Grand Jury investigation has always been recognized as different in kind and quality from the proceeding which determines issues of law and fact in a criminal case.

In *People* v. *Sexton*, 187 N. Y. 495, the Court per Werner, Jr., said at page 513:

> "A Grand Jury, although for some purpose a part of the Court in connection with which it is convened, is in some aspects a separate and independent tribunal, free from the restraint of the Court, and at liberty to decide upon its own methods of procedure in so far as they are not controlled by statute or immemorial usage having the force of law. One of the attributes and powers of this independent existence is to decide when and in what order witnesses shall be called, and to some extent, who shall be called. For all the ordinary purposes of procuring evidence a Grand Jury is a distinct body clothed with authority to conduct the examination of witnesses in any way that does not conflict with established legal rules. The Court has no general control over witnesses summoned before a Grand Jury except to punish them for contumacy or contempt * * *"

Ballantine's Law Dictionary, 1948 Ed. page 312, defines "criminal proceeding" as the "prosecution of a person charged with a criminal offense contemplating the conviction and punishment of the person so prosecuted". As this Court said in *Post* v. *United States*, 161 U. S. 583:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made

> against the accused, either by indictment presented or information filed in Court, or at the least, by complaint before a magistrate. *Virginia* v. *Paul*, 148 U. S. 107, 119, 121; *Rex* v. *Phillips Russ & Reg.*, 369; *Regina* v. *Parker Leigh and Cave*, 459."

When it was provided in Rule 12(a) of the Criminal Rules that the "pleadings in criminal proceedings shall be the indictment", etc., the rule-makers gave recognition to the well-established principle that a criminal proceeding commenced only when a Grand Jury proceeding had concluded with the indictment.

In *Adams* v. *State*, 214 Ind. 603, the Court said:

> "The Grand Jury is not a judicial tribunal, but rather an informing or accusing body. While an appendage of the Court it does not conduct its proceedings judicially, and when after its secret ex parte investigation it finds and returns to the Court an indictment against a defendant is ended. It is clear, therefore, that the investigation of a Grand Jury is a proceeding which is wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant in the district court."

The numerous references in the new Title 28, the recodification of Title 18, and the promulgation of the Federal Rules of Criminal Procedure, all of which employ the phrase "criminal proceeding", are intelligible only as referring to the adjudication of the criminal responsibilty of one or more identified accused. Both the context and the history of the words exclude from that scope the preliminary investigation leading to the accusation, whether conducted by Grand Jury or other inquisitorial or informing body.

It is only after a charge against a defendant is made that a criminal proceeding is thereby begun. It is then the duty of the Attorney General to conduct the trial and

present evidence to establish that charge in Court. To that end, he issues subpoenas to witnesses whose testimony he desires without application to the Court. However, when it comes to a citizen residing abroad, Congress saw fit to limit the right to subpoena such non-residents, primarily because it involved making possible heavy sacrifices, jeopardizing substantial business interests, travelling thousands of miles at great inconvenience and then likely find that their testimony was unnecessary or unimportant. The Attorney General is therefore required to apply to the Court for the right to issue a subpoena to such witness, and necessarily show, for that purpose, to the Court sufficient facts to justify the request, so that the Court may be in a position to exercise its judicial discretion in the matter.

In interposing this barrier of procedural safeguard between the power of the government and the right of the individual, the Court performs its highest function.

While the Attorney General is in charge of trials of criminal proceedings following a charge, he is not in control of the Grand Jury investigation, or its proceedings. He may assist and advise, but he cannot dictate or even choose. When Congress spoke of testimony desired "by the Attorney General", it obviously referred to testimony desired by him in a criminal proceeding which he had to conduct or of which he was in control.

Congress knew how to compel testimony in Grand Jury investigations when it wanted to do so, and even there, it took the precaution to limit the coercive subpoena to cases "where it is necessary in the public interest". In the Compulsory Testimony Act of 1954, as contained in 18 U. S. C. Sec. 3486(c):

> "Whenever in the judgment of the United States Attorney the testimony of any witness * * * in any case or proceeding before any grand jury or court of the United States * * * is necessary to the public interest * * *"

The use of the phrase "criminal proceeding" elsewhere in Title 28, and in the contemporary codification of Title 18, gives compelling support to the conclusion that Grand Jury investigations are not embraced within that phrase. For example: 28 U. S. C. Sec. 753(f): ("fees for transcripts furnished in criminal or habeas corpus proceeding"); 28 U. S. C. Sec. 1918 ("District Courts; fines, forfeitures and criminal proceedings * * *"); 18 U. S. C. Sec. 3144 ("judgment of State Court in any criminal proceeding"); 18 U. S. C. Sec. 3570 ("Judgment * * * in any criminal proceeding").

4.

The Statute must be construed to require a factual showing sufficient to justify the Court in acting to issue the subpoena.

When Congress wrote into the Statute the requirement that the Attorney General must apply to the Court for permission to issue a subpoena to a non-resident witness, it recognized, with evident realism that while the Attorney General is the Government's Chief Law Officer, he is at the same time an important political figure in any administration; that a prosecution or criminal proceeding conducted or supervised by him may become or be part of a political cause to mold public opinion or promote the interests of the political party in power and therefore limited his power to recall non-resident citizens at will, on the mere plea that he desired their testimony. More was required.

He must apply to a court, which is not an auxiliary of the Attorney General but exercises its functions judicially and independently. It follows that in acting upon an Attorney General's application for such subpoena the Court would necessarily have to be furnished with all pertinent facts necessary to establish his right to, as well as his need for, the desired testimony and the extraordinary circum-

Thereafter, the Petitioners duly filed notices of appeal, fully perfected their appeals in accordance with the Rules of the Court, and served and filed their briefs. Following the filing of such briefs, and after July 1957 the U. S. Attorney twice requested and was granted additional time to file the Government's briefs. On November 4, 1957 the appeals appeared for argument on the Calendar of the Court of Appeals, at which time the Government moved, by notice of motion returnable that day and served with its briefs a few days before, to dismiss the Petitioners' appeals on the grounds that the Petitioners had liquidated their American assets and had departed from Mexico to Czechoslovakia in July 1957.

The Court of Appeals, after hearing argument on the merits of the appeal and on the motion to dismiss, entered an order dated December 5, 1957 directing that the appeals be dismissed unless Petitioners deposited the amount of their fines or gave security for such payment within sixty days. No such deposit or security having been made or tendered, judgment dismissing the appeal was entered on February 5, 1958.

Reasons Relied on for the Allowance of the Writ

Two important questions of federal law which have not been, but should be settled by this Court are here involved. Both questions were decided below contrary to the applicable statutes and decisions of this Court.

The basic question is: Whether a subpoena, purportedly issued pursuant to 28 U. S. C. Sec. 1783, commanding a citizen residing abroad to appear and testify before a Grand Jury within the United States is valid, without a showing that the testimony of the non-resident witness is to be given before a Court, and is material and necessary to a criminal proceeding or action then pending in that Court.

The Petitioners who failed to comply with such subpoenas served upon them abroad were held in contempt of

Court and fined $25,000 each although the subpoenas themselves specified a penalty of $250 in the event of failure to obey.

They duly appealed to the Court of Appeals, and duly perfected their appeals and filed their briefs. The second question then arises: May the Court of Appeals impose as a condition of prosecuting their appeals a requirement that they deposit or give security for the payment of the fines and in default thereof, dismiss their appeals?

These questions are of great importance in view of the countless thousands of citizens now travelling or residing abroad and who, if the Attorney General may thus compel non-resident citizens to return to the country to testify before any of the numerous Federal Grand Juries sitting within the United States investigating unspecified matters, may be subject to his whim without regard to the necessity, materiality or relevancy of the desired testimony or the witness' knowledge of matters pertinent to the investigation.

1.

No power exists to condition review of a duly perfected appeal on filing security for payment of a fine.

The jurisdiction of the Court of Appeals is governed by statute. Section 1291 of Title 28 prescribes that such Court "shall have jurisdiction of appeals from all final decisions of the District Court of the United States". This Court has declared that where a statute provides for an appeal, and its terms are complied with, the review of the appellants' grievance is "an absolute right which we cannot refuse or deny" *Mason* v. *N. W. Insurance Co.*, 106 U. S. 163, 165, and that an "appeal gives the upper Court a power of review and not one of intervention" *Cohen* v. *Beneficial Loan*, 337 U. S. 541, 546. The Court of Appeals for the Third Circuit has correctly said: "Our jurisdiction is not discretionary; it is settled by statute" *Cohen* v. *Globe Indemnity Co.*, 120 F. 2d 791.

This Court has also declared that "a party ought not to be deprived of his right of appeal upon the terms which the law prescribes," *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 395.

The power to require a bond to secure a stay, or a supersedeas has never been construed to curtail the right of appeal, where such stay or supersedeas was not sought.

No stay or supersedeas was sought or granted here.

In *Lewis* v. *Holmes*, 194 Fed. 842, the District Judge required as a condition for the appeal that the complainants, who sought no stay, file a bond in a large amount. The Court of Appeals pointed out that when a bill of review is filed within the time allowed by law, the right to proceed is "a right of course" and nullified the condition saying:

> "This requirement is neither reasonable in the amount named for the bond, nor authorized under the statute, as no supersedeas is mentioned or involved therein. Appeal from a final order or decree in equity is a matter of right, to be allowed by the trial court when sought, as of course, without other conditions than the filing of the usual bond for costs of the appeal."

> "At common law an undertaking on appeal was never required. 1 Enc. Pl & Pr. 965, and cases cited. It is purely a statutory regulation, and unless the statute specifically makes such requirement, it cannot be exacted at all * * *" *State ex rel. Hodgden* v. *District Court*, 82 Pac. 663, 33 Mont. 117.

In *Connley* v. *United States*, 41 F. 2d 49, an order fixing bail pending an appeal from a conviction, required that the bail bond contain a condition that it should also operate as a supersedeas to a judgment for the payment of the fine. This was held improper.

In *Cain* v. *U. S.*, 148 F. 2d 182, an order requiring, in addition to a reasonable amount of bail for the appearance of the appellants, that a supersedeas bond be given to pay the amount of the fine, was held improper as requiring excessive bail.

Federal Judge Yankewitch, *Release on Bond by Trial and Appellate Courts*, 7 F. R. D. 271, says at 281:

> "Following the enactment of the new rules, and deeming ourselves justified by the second clause of Subdivision A(1)(3) of Rule 38, some of us adopted the custom of requiring, in cases in which both imprisonment and a fine were imposed—as a condition for granting bail on appeal—the deposit of the amount of the fine in the registry of the Court to abide the result of the appeal * * * But on January 29, 1947 the Circuit Court of Appeals told us we misread the clause, and that it does not allow us to condition bail on such deposit *unless the defendant desires to stay payment of the fine.* The Court made the ruling without writing an opinion, in the case of *United States* v. *Bleker and Robinson* * * * they invalidated the portion of the Order requiring the deposit on the ground that such deposit constituted excessive bail under their prior rulings." (Italics in original.)

The essence of all these cases is that "statutory review is important and must be exercised without discrimination" (*National Union* v. *Arnold*, 348 U. S. 37, 43).

The Court below imposed the condition here involved in reliance upon the *Eisler* case (338 U. S. 189), saying it could "see no valid distinction between this case and that of Eisler".

To begin with, in *Eisler's* case there was an indictment, a trial, a conviction and an affirmance by the Court of Appeals. Eisler had applied for and obtained his freedom pending his appeal on his undertaking to remain subject to

the Court's jurisdiction. Eisler violated his undertaking to the Court and removed himself from the Court's jurisdiction.

Here, there was no stay, no supersedeas, no order or direction which was violated. The Petitioner's funds alleged to have been liquidated were not under the Court's jurisdiction or subject to its orders. The alleged liquidation referred to by the Government, was not restrained or sought to be restrained and occurred before the District Court judgment. The Petitioners were not within the territorial limits of the United States when the proceeding was started or at any time during its pendency and it is of no consequence whether the Petitioners resided in Mexico or Czechoslovakia pending the determination of their appeal. Non-residence is no ground for dismissing an appeal, nor may the Court dismiss an appeal as punishment for failure to give security, when there is no such requirement in the statutes.

What the Court has done in this case was to give the provisions of the Contempt Statute a broad construction contrary to the holdings of this Court, which has always given that statute a narrow construction, and as "embodying a Congressional plan to limit the Court's Contempt power to the least possible power adequate to the end proposed. The exercise by Federal Courts of any broader contempt powers than this would permit too great inroads on the procedural safeguards of the Bill of Rights". *Cammer v. U. S.*, 350 U. S. 399. It is a principle of natural justice and of the true administration of justice, that when nonresident citizens are sought to be compelled to give up their places of sojourn abroad and their business and to return to their country for purpose of uncertain and unspecific necessity or materiality, and failing to do so, are heavily fined, they are at least entitled to resist and defend such action, and the right of an appeal is inseparable from their right of defense.

In the absence of specific Constitutional or Statutory authority, the Court of Appeals had no right to dismiss the Petitioners' appeal, timely taken and fully perfected; and the dismissal in this case constituted a deprivation of constitutional rights and denial of due process under the Fourth and Fifth Amendments to the Constitution.

2.

The statute, as codified, did not authorize the subpoenas in question.

It has been long settled: that where legislation affecting a particular subject matter has undergone revision and consolidation, by codification, the revised sections will be presumed to bear the same meaning as the original sections (even though reworded and rephrased), unless the intent to effect a change is clearly and indubitably expressed. 2 Sutherland, Statutory Construction Section 3709, page 225.

> "It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed."
> *United States* v. *Ryder*, 110 U. S. 729, 740.

In *Federal Reserve Bank of Dallas* v. *Webster*, 287 F. 579, 586, the Court said:

> "In construing the revised statutes the presumption is against an intention to change the meaning and construction of a statute re-enacted therein. Mere changes in phraseology arising from a condensation are not to be regarded as changing the pre-existing law. * * * A change of the law by revision will not be presumed, unless the language in the revision cannot possibly bear the same construction as the revised and repealed act."

The entire explanation for the language changes appearing in 1783 is expressed in the Official Reviser's Notes as follows:

> "Based on Title 28 U. S. C. 1940 ed. 711, 712, and 713 (July 3, 1926 ch. 762, Secs. 1-3, 44 Stat. 835). Word 'resident' was substituted for 'or domiciled therein' (See reviser's note under section 1391 of this title).
>
> Words 'or any assistant or district attorney acting under him' after 'Attorney General' in section 712 of Title 28, U. S. C. 1940 ed. were omitted since in any event, the approval of the Attorney General would be required. (See section 507 of this title.)
>
> Changes were made in phraseology." [1]

In the District Court, the Government conceded that the statute (Walsh Act) as originally enacted "specifically related to the trial of criminal actions and therefore by its very words excluded its application to Grand Jury proceedings" and contended that the changes in phraseology in the 1948 codification where the phrase "criminal proceedings" is used instead of "criminal action" expanded the scope of the statute to include subpoenas for Grand Jury investigation.

This question is of considerable importance and has never been passed on or considered by any Appellate Court.

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[1] Mr. William W. Barron, Chief Reviser of Title 28 U. S. C. in his article on "The Judicial Code, 1948 Revision," 8 F. R. D. 439, 441, 445, said:

> "There was no purpose on the part of the Revision Staff to effect any change in existing law. Despite this, the process of comprehensively examining and rewriting the Code disclosed some grave disparities, inconsistencies and ambiguities not correctable by mere codification. This was due in part to forty years of piecemeal amendment to the 1911 Judicial Code. Some such problems had manifested themselves in difficult and not wholly satisfactory judicial interpretations. The Reviser and the Advisory Committee, upon discovering situations which would not yield to codification, felt in duty bound to apprise Congress of their findings and

In *Feres* v. *United States*, 340 U. S. 135, this Court referred to the codification changes in the 1948 Code, saying:

> "In recodifying Title 28 of the United States Code, changes in language were made * * * we attribute to this change of language no substantial change of law."

The report of the House Committee on Revision of the Laws to accompany H. R. 712 (H. Rep. 2646, 79th Cong., 2nd Sess. July 24, 1946) also showed the reported bill was not intended to make substantive changes.

Nowhere, either in the Reviser's Notes to Sections 1783 and 1784, or in the proceedings in Congress or elsewhere, does it appear that the use of the words "criminal proceeding" was intended to make a substantive change in the scope of the Walsh Act. On the contrary, it is everywhere made clear that the only changes, other than those specifically referred to in the notes, which refer to matters

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recommendations. Consequently, a few such changes, substantive in nature, were recommended to Congress. These were carefully outlined in the Reviser's Notes, and fully considered by the Judiciary Committees of both houses * * *" (at p. 441).

"Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expresse'

Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.

Congress recognized this rule by including in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor" (pp. 445-6).

The opposing affidavit made by the appellants' attorney denies none of the foregoing facts. It says not a word about their liquidating their assets nor suggests that they have any assets remaining in the United States.

Upon the record before us, the conduct of the appellants in liquidating their American assets, abandoning their United States citizenship and going to Czechoslovakia, shows a determined effort to deprive the court of power to execute its mandate if the judgment on appeal should be affirmed. Here we have an undisputed, studied, and successful attempt to render the court powerless to enforce its decree. We see no valid distinction between this case and that of Eisler v. United States, 338 U. S. 189, dismissed 883. Accordingly, we direct the Clerk of the Court to enter an order dismissing the appeal unless within 60 days from the date of this opinion the appellants shall deposit the amount of their fines and costs in the registry of the district court or give bond for the payment thereof.